

“collects less in licensing fees . . . cutting into the network’s largest source of revenue.”⁸² This reduction in income, coupled with limitations on Tennis Channel’s audience size, “make it difficult for the network to acquire programming rights” and, indeed, to compete with networks like Versus for valuable tennis programming.⁸³ And the network’s limited distribution “discourage[s] advertisers from placing advertisements on the network,” reducing Tennis Channel’s advertising revenues.⁸⁴

As the Commission also found, these harms are particularly great because Comcast is the nation’s largest MVPD; indeed, its discrimination results in a loss of access to approximately [REDACTED] subscribers.⁸⁵ Due to its size and influence, Comcast’s carriage decisions have also caused a “ripple effect” in the industry, multiplying the harmful effects of Comcast’s discrimination.⁸⁶ While it seeks now to minimize the significance of this phenomenon, Comcast was concerned about precisely these effects for its own networks when an MVPD a fraction of its size [REDACTED]
[REDACTED]⁸⁷

Comcast dismisses any potential harm to Tennis Channel in a single paragraph. It claims that Tennis Channel cannot be harmed because a stay would simply preserve the status

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* ¶ 86.

⁸⁶ *Id.* ¶¶ 83, 87, 89.

⁸⁷ *Id.* ¶ 73 (citing Comcast’s internal document reflecting a concern that [REDACTED]). *See also* Tennis Channel Exh. 38 at COMTTC00052319 [REDACTED].

quo.⁸⁸ But the status quo is precisely the problem Tennis Channel faces, and its preservation would require Tennis Channel to continue to withstand the competitive injuries cited in the Commission's decision for an extended period of time pending the conclusion of judicial review, when it has already suffered from that discrimination for more than three years.⁸⁹

Tennis Channel has no mechanism under the program carriage rules for seeking compensation for the past harms it has endured from Comcast's discrimination. It cannot recover lost subscriber fees, advertising revenues, or monetary relief. And it cannot retroactively correct the various impairments it has suffered on its ability to compete for viewers, advertising, and programming rights. Its only option at this point is to obtain prospective relief against Comcast's continued discrimination. And each day that Tennis Channel is denied that relief is another day that Tennis Channel is harmed without any possibility of being made whole.

This harm exceeds simple monetary loss. The premise of Section 616, and of the Commission's application of it to these facts, is that discriminatory carriage can irreparably impact an independent network's ability to compete. The Commission has determined that Comcast's conduct has done precisely that to Tennis Channel. Allowing Comcast to continue its discrimination pending exhaustion of appellate review will only compound the harm from this illegal conduct, and it would constitute a tangible reward to Comcast that in critical respects would vindicate its decision to violate the law.

⁸⁸ Stay Petition at i-ii, 2, 22, 27.

⁸⁹ This is far more onerous than asking Tennis Channel to wait a few months for Commission review of the Initial Decision, and thus, contrary to Comcast's claim in its Stay Petition, the arguments Comcast made to the Commission earlier this year cannot simply be recycled. *See, e.g.*, Stay Petition at i, 2, 23.

D. The Public Interest Would Be Disserved By Allowing Comcast To Continue To Engage In Anticompetitive Discrimination.

The public interest lies squarely in favor of prompt compliance with Section 616. Comcast's arguments to the contrary are based not on any specific facts of this case but rather on a fundamental disagreement with these interests. Congress enacted Section 616 with the express goal of promoting competition and diversity in programming by preventing MVPDs from favoring their own networks over unaffiliated networks.⁹⁰ Congress went further and determined that, in light of the importance of the public interest goals underlying Section 616, Section 616 complaints should be resolved promptly through "expedited review."⁹¹ The Commission's rules and the Media Bureau's Hearing Designation Order implement this goal by expressly holding that the Initial Decision would become effective immediately upon release.⁹² The Commission chose to delay briefly Comcast's obligation to comply only to ensure the Commission had adequate time to provide sufficient guidance to the parties and to future litigants on the issues adjudicated and remedies prescribed — and it did so with an express warning to Comcast that it should be prepared to comply.⁹³

It would be fundamentally at odds with these legislative and regulatory policy interests to allow further delay. Comcast's discrimination has extended for more than three years. Every body charged with reviewing Comcast's conduct — from the ALJ to the Enforcement Bureau, and now the full Commission on the basis of a full trial record — has

⁹⁰ See Pub. L. No. 102-385, 106 Stat. 1460, § 2 (1992); 2011 Program Carriage Order ¶ 32.

⁹¹ 47 U.S.C. § 536(a)(4).

⁹² 47 C.F.R. §§ 76.10(c)(2), 76.1302(g)(1); HDO ¶ 23 n.119.

⁹³ Conditional Stay Order ¶ 5 n.22.

found discrimination so serious it merits the fullest sanction allowed by law. On the facts of this case, delay cannot be squared with the core purposes of Section 616.

Comcast argues that a delay is appropriate because implementation would require it to raise prices for its customers, but it has made no showing of that assertion nor addressed the offsetting benefits from carrying Tennis Channel broadly. And it ignores the fact that it has any number of options to lower its costs, including by paying itself [REDACTED] than the multiples it pays Golf Channel and Versus for carriage — each of which is individually roughly [REDACTED] [REDACTED] to carry broadly than Tennis Channel.⁹⁴

Comcast's other public interest arguments merely re-hash its arguments on the merits. But Comcast does not address the fact that compliance with the Order would offer Comcast customers an additional channel, and thus added programming choice, rendering Comcast's speculative assertions about customer frustration and loss of goodwill entirely pretextual.⁹⁵ Instead Comcast argues that minimal disruption for [REDACTED] of Comcast's 22.1 million subscribers somehow outweighs the benefits of additional programming choice for its remaining [REDACTED] subscribers who will suffer no disruption at all. But even assuming a small subset of Comcast's viewers experience initial inconvenience by the addition of Tennis Channel to their lineup — a blanket assertion for which Comcast has offered no evidentiary support — “any short-term disruption that Comcast viewers might experience is outweighed by

⁹⁴ See *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Proposed Findings of Fact and Conclusions of Law of The Tennis Channel, Inc. ¶ 217 (Jun. 7, 2011); see also Order ¶ 78.

⁹⁵ See *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Enforcement Bureau's Comments on Conditional Petition for Stay ¶ 6 (Feb. 6, 2012). (“There is no merit to Comcast's claim that frustration and confusion among its viewers supports a stay of the [carriage remedy]. Whether there would be any such confusion or frustration at all is speculative, given that cable companies modify their channel lineups with relative frequency.”).

the long-term benefits they would enjoy from the diversity in programming brought about by implementing the [carriage remedy].”⁹⁶

Comcast essentially concedes the benefits of programming diversity by expressing concern that its customers would be upset if Tennis Channel were removed from its lineup in the unlikely event that Comcast prevails on appellate review. If additional programming choice is not a positive good for consumers, Comcast cannot explain why reducing channel options would disrupt “settled expectations” and cause customer frustration.

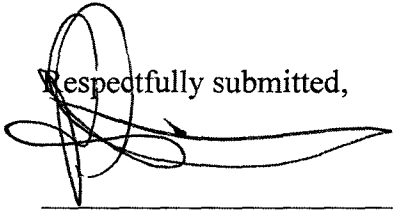
In light of the important interests served by prompt resolution of program carriage complaints, and Comcast’s inability to offer any countervailing interests that justify the extraordinary relief of a stay, Comcast’s request to further defer its compliance with the law should be rejected. Grant of a stay would, in fact, reward Comcast for predatory and unreasonable behavior that is flatly prohibited by Section 616 and the Commission’s program carriage rules.

⁹⁶

Id.

Conclusion

For the reasons set forth above, Tennis Channel respectfully requests that the Commission deny Comcast's Petition for Stay and require that Comcast comply fully and promptly with the remediation prescribed in the Commission's July 24, 2012 Order.

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August 2, 2012

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CERTIFICATE OF SERVICE

I, Leah E. Pogoriler, hereby certify that on this 2nd day of August, 2012, I caused a true and correct copy of the foregoing Opposition to Comcast's Petition for Stay Pending Judicial Review to be served by electronic mail and overnight delivery upon:

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